

Memorandum

To: Ms. Lynn Bartolo, Chief
Policy and Compliance Division (MIC:57)

Date: November 2, 2012

From: Pamela Mash *PM*
Tax Counsel
Tax and Fee Programs Division (MIC:82)

Subject: Mobile Sellers of Cigarette and Tobacco Products
Assignment No. 12-239

I am writing in response to your May 18, 2012 memorandum to Christine Bisauta in which you presented questions related to the interpretation of Business and Professions Code section (section) 22972. Section 22972 provides that a cigarette and tobacco products retailer that owns more than one "retail location" must obtain a separate retailer license for each "retail location." A "retail location" is defined as both (1) any building from which cigarettes or tobacco products are sold at retail and (2) a vending machine. (Bus. & Prof. Code, § 22971, subd. (q).)

In your memorandum and follow-up emails, you present a number of questions regarding a retailer's licensing requirements when sales of cigarettes and tobacco products are made by mobile vendors, at special events, and at private parties. Each of your specific questions and the Department's current practices are set forth below, with my response following.

(1) Does the definition of "retail location" mean only store front type of buildings, i.e., permanent structures? Special Taxes has been advised previously that the above mentioned definition of "retail location" means a location that has an identifiable street address from which sales can be conducted (excludes private mail box service centers, etc). This interpretation has been applied to mobile vendors, special events and for private parties. This could be expanded to allow a catering truck that stops at the same locations every day to hold retailer licenses for each of those "stops" if they wish to make cigarettes and tobacco products sales. Special Taxes would require that the locations from which sales are to be made be listed as sub locations under the owner's SUT permit.

A retail location must be a building or a vending machine. (Bus. & Prof. Code, § 22971, subd. (q).) The term "building" is not defined in the Business and Professions Code, but "building" is defined in the Health and Safety Code to mean any structure used for support or shelter of any use or occupancy, and includes a structure wherein things may be grown, made, produced, kept, handled, stored, or disposed of. (Health & Saf. Code, § 18908, subs. (a), (b).) "Structure" generally means that which is built or constructed, an edifice or building of any kind or any piece of work artificially built or composed of parts joined together in some definite manner. (Health & Saf. Code, § 18908, subd. (a).) The statute, however, specifically provides

that special purpose commercial coaches, among other things,¹ are not structures. (*Ibid.*) A "special purpose commercial coach" means a vehicle with or without motive power, designed and equipped for human occupancy for industrial, professional, or commercial purposes, which is not required to be moved under permit, and shall include a trailer coach. (Health & Saf. Code, § 18012.5.) An example of a special purpose commercial coach is a mobile food preparation unit, also known as a food truck or a catering truck.

Based on the statutory language above, while the definition of "building" may not be limited to a permanent structure, catering trucks are specifically excluded from the definition. Therefore, a catering truck from which cigarettes or tobacco products are sold is not a building or vending machine and, accordingly, may not be licensed as a retail location.

(2) Does a licensed retailer who has a store front need to be registered with an additional license if they are making periodic sales at a flea market, festival, wedding, fair, etc.? Special Taxes has interpreted BPC § 22972 to mean that any physical location where a retailer is making a sale or where retail transactions occur needs to be licensed prior to offering cigarettes or tobacco products for sale. Following along with the reasoning illustrated in question 1, as long as a physical address is attributable to the location where sales are to be made, a retailer license for that location needs to be obtained by the retailer making the sale.

A retailer that owns or controls more than one retail location must obtain a separate license for each retail location. (Bus. & Prof. Code, § 22972.) As stated above, a "building" is not limited to a permanent structure. It is our opinion that, unless specifically excluded, any building or structure—whether permanent or temporary—from which cigarettes or tobacco products are sold may be treated as a retail location. We agree that an identifiable street address for each location where sales may take place is necessary for licensing purposes. (See Bus. & Prof. Code, § 22973, subd. (a)(2), which requires the retailer license applicant to provide the address of each retail location.) Therefore, it is our opinion that a licensed retailer with a permanent retail location must obtain a separate retailer's license for sales made at booths or stands at flea markets, festivals, etc.

(3) Does a one-time event seller qualify as a "retailer" under the definition of retailer in BPC § 22971(p)? Special Taxes currently will allow a one-time event seller to register as a "retailer." SUTD's process for purposes of issuing a seller's permit lists their "business address" as their home address and each one-time event location is listed on their account as a sub location (to ensure local taxes are reported to the proper jurisdiction). Because the seller holds a seller's permit and the sub location is listed on the account, Special Taxes would be able to issue a retailer license for each of those locations.

A "retailer" is a person who engages in this state in the sale of cigarettes or tobacco products directly to the public from a retail location, and includes a person who operates vending machines from which cigarettes or tobacco products are sold in this state. (Bus. & Prof. Code,

¹ Section 18908 specifically excludes from the definition of structure any mobilehome, as defined in Section 18008, manufactured home, as defined in Section 18007, special purpose commercial coach, as defined in Section 18012.5, and recreational vehicle, as defined in Section 18010.

§ 22971, subd. (p).) There is no requirement that there be multiple sales or that sales take place at multiple events for a person to be considered a retailer under this definition; a one-time sale from a retail location is sufficient. Therefore, we agree that a one-time event seller making sales from a retail location is a retailer as defined in section 22971, subdivision (p), and should obtain a retailer's license for each location where an event is being held.

(4) Does a location need to be registered as a "retail location" if no sales are to be made but instead cigarette and tobacco products are to be given away to attendees without cost to the recipients at the event? Special Taxes would not require that a retailer license be obtained for a demonstration/free give away of tax paid product if no sales are to take place, because no retail transactions of cigarettes or tobacco products are being conducted. An example of the above scenario would be a "cigar roller" who has a seller's permit and who also has a retail cigarette and tobacco license for a retail location. The roller brings the tax paid product from his location to roll at the event and hand out the product without cost to attendees.

A location is considered a retail location only when there is a retail sale made from that location. (Bus. & Prof. Code, § 22971, subd. (q).) "Sale" includes any transfer of title or possession for a consideration, exchange or barter, in any manner or by any means whatever. (Rev. & Tax. Code, § 30006.) When cigarettes or tobacco products are transferred without consideration, no sale has occurred. If no sale has occurred, the location is not regarded as a retail location and thus no retailer's license is required. Therefore, we agree that a retailer's license would not be required based solely on product being handed out at an event without cost to the attendees.

(5) Would the response to question 4 change if the cigar roller charged the event host for his rolling services (i.e., flat fee per hour) but still gives away the tax paid product without charge to the attendees? Special Taxes would not require a retailer license for said activity since the fee paid is not attached to a sale of product but instead to a service. The license requirement is not met since it is attached to the sale of cigarettes and tobacco products not a service.

As discussed above, if the product is given away and not sold, a retailer's license is not required for that location. We agree that in your example the fee paid by the event host is for the rolling services offered and any cigarettes or tobacco products given to attendees without charge are incidentally used by the cigar roller in rendering the service. Therefore, it is our opinion that a retailer's license is not required at such an event even when the host pays a service fee.

Under different facts, however, an event cigar roller may make retail sales of cigarettes or tobacco products and be required to obtain a retailer's license. For example, if the attendees pay a charge to attend the event and the attendees pay that charge with the expectation of receiving a cigar or cigars (perhaps the attendees are informed in advance that they will receive a cigar if they pay to attend), that charge (or a portion of the charge) would be consideration paid in exchange for transfer of title to and possession of the cigar or cigars. In other words, sales would occur. As explained above, a person making retail sales of cigarettes or tobacco products must obtain a separate retailer license for each retail location where such sales occur. An event location can be a retail location.

(6) If sales are allowed at a location other than a store front with a permanent structure, like a flea market or street fair, would the retailer be required to have one year of records on hand at each event per BPC § 22974? Would the invoice requirement extend to the product in his possession/offered for sale at the location during the course of the event? Special Taxes has never addressed this question before but it is believed that if you are licensed as a retailer you would be required to either have one year of records available at the retail location (place sales are to be made) or would be required to produce them upon request for a random inspection as per BPC § 22974.

Retailers are required to maintain records of purchases of cigarettes and tobacco products at the retail location for at least one year after the purchase, and these records must be made available upon request during normal business hours for review inspection by the board. (Bus. & Prof. Code, § 22974.) As discussed above, retailers must obtain a separate retailer's license for each retail location where sales are made. As licensed retailers, they are subject to the requirements set forth in section 22794. As such, retailers at special events such as flea markets or fairs must maintain one year of invoices and be prepared to make the invoices available in the event of an inspection. Because section 22974 requires that inspections occur during normal business hours, it is our opinion that these inspections may only occur during the course of the special event. Therefore, these retailers must have the invoices available at the time of the event and for the entire inventory available for sale at the event.

Please let me know if you have any questions about the information provided here or would like further assistance regarding this matter.

PAM/yg


cc: Mr. Richard Parrott (MIC:88)
Ms. Debbie Kalfsbeek (MIC:31)